

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NIKKI POOSHS,

Plaintiff,

v.

PHILLIP MORRIS USA, INC., et al.,

Defendant.

No. C 04-1221 PJH

**ORDER RE PLAINTIFF'S OFFER OF
PROOF RE CONCEALMENT CLAIM**

On May 27, 2014, pursuant to court order, plaintiff Nikki Pooshs filed an Offer of Proof as to the evidence supporting the post-1969 concealment claim.

PROCEDURAL BACKGROUND

This case has been pending for well over 10 years. Plaintiff filed the original complaint in the Superior Court of California, County of San Francisco, on January 13, 2004, alleging claims of negligence, fraud/misrepresentation, failure to warn, and unfair business practices and deceptive advertising against 22 defendants, including a number of cigarette manufacturers.

The case was removed to this court on March 26, 2004, based on diversity jurisdiction. Starting on April 2, 2004, various defendants or groups of defendants filed a total of seven motions to dismiss, some of which were later withdrawn after plaintiff

1 stipulated to dismiss certain defendants. On April 21, 2004, plaintiff filed a motion to
2 remand, which the court denied in an order issued June 8, 2004. On August 11, 2004, the
3 court granted defendants' motion to dismiss, finding that under Soliman v. Philip Morris,
4 Inc., 311 F.3d 966 (9th Cir. 2002), plaintiff's claims were barred by the applicable statutes
5 of limitation. The court entered judgment on August 20, 2004.

6 Plaintiff filed a notice of appeal on September 9, 2004. While the appeal was
7 pending in the Ninth Circuit, the parties jointly moved for an order remanding the case for
8 further consideration in light of Grisham v. Philip Morris U.S.A., Inc., 40 Cal. 4th 623 (2007)
9 – a decision issued by the California Supreme Court on February 15, 2007. In accordance
10 with the parties' request, the Ninth Circuit issued a mandate on September 27, 2007
11 remanding the case to this court.

12 On February 6, 2008, defendants moved for summary judgment, arguing that
13 plaintiff's claims were time-barred because, while she was not diagnosed with lung cancer
14 until January 2003, she first discovered that she suffered from physical injury caused by
15 smoking cigarettes in 1989. On May 27, 2008, the court issued an order granting the
16 motion. On May 30, 2008, plaintiff filed a notice of appeal.

17 On April 1, 2009, the Ninth Circuit issued an order certifying questions of state law to
18 the California Supreme Court, regarding the running of the statute of limitations when two
19 separate physical injuries arise out of the same wrongdoing, but at separate times. On
20 May 5, 2011, the California Supreme Court issued its opinion in Poosh v. Philip Morris
21 USA, Inc., 51 Cal. 4th 788 (2011), holding that an earlier-discovered disease does not
22 trigger the statute of limitations for a lawsuit based on a later-discovered separate latent
23 disease caused by the same tobacco use. The Ninth Circuit requested that the parties
24 submit supplemental briefs, and on August 5, 2011, issued a mandate remanding the case
25 to this court.

26 The court held a case management conference on September 1, 2011, setting a
27 November 29, 2012 pretrial conference date and a January 7, 2013 trial date. On June 18,
28 2012, the defendants remaining in the case – Philip Morris USA, Inc. ("Philip Morris"), R.J.

1 Reynolds Tobacco Company ("RJR"), and Hill and Knowlton Strategies, LLC ("H&K") – filed
2 a motion for summary judgment on the design-defect claims, the failure to warn claims, the
3 claim for "concert of action," and the fraud and concealment claims. Among other things,
4 defendants argued that to the extent plaintiff was claiming that additional or different
5 information about health risks should have been disclosed after July 1, 1969, such claims
6 were subject to express preemption under the Federal Cigarette Labeling and Advertising
7 Act of 1965, as amended by the 1969 Public Health Cigarette Smoking Act of 1969
8 ("Labeling Act"). Following completion of the briefing, the court heard the motions on
9 August 8, 2012, and issued an order on October 22, 2012.

10 A. The Order re Defendants' Motion for Summary Judgment (Doc. 229)

11 In their summary judgment motion, defendants argued that the failure-to-warn and
12 concealment claims were preempted by the Labeling Act to the extent such claims were
13 based on the assertion that new or different information about health risks should have
14 been disclosed after July 1, 1969. Defendants also asserted that to the extent the first
15 cause of action could be construed as alleging a claim of negligent failure to warn, it was
16 preempted insofar as it was based on any events after 1969, and that the fifth cause of
17 action for fraudulent concealment and the tenth cause of action for "off-label failure to warn"
18 were also preempted to the extent that they related to events after 1969.

19 The Labeling Act has required the placement of warning labels on cigarette
20 advertising and packaging since 1966. As amended, the Labeling Act contains two
21 express preemption provisions. Section 5(a) protects cigarette manufacturers from
22 inconsistent state labeling laws by prohibiting any requirement that additional statements
23 relating to smoking and health be placed on cigarette packages. 15 U.S.C. § 1334(a).
24 Section 5(b) provides that "[n]o requirement or prohibition based on smoking and health
25 shall be imposed under State law with respect to the advertising or promotion of any
26 cigarettes the packages of which are labeled in conformity with the provisions of this
27 chapter." 15 U.S.C. § 1334(b).

28 In Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992), the plurality held that § 5(b)

preempts both positive enactments and certain state common-law actions that would impose such "requirements or prohibitions" after that date.¹ See id. at 521-23. Under the preemption framework set forth by the plurality, determining which state claims are preempted requires a court to consider the "legal duty that is the predicate" of a particular claim, and determine whether it falls within the scope of the preemption provision. Id. at 523. Failure-to-warn claims are preempted, "to the extent that they rely on a state-law requirement or prohibition . . . with respect to . . . advertising and promotion." Id. at 524.

The plurality found that a post-1969 fraud claim that the cigarette manufacturers, through their advertising, intentionally attempted to minimize or "neutralize" the effect of federally mandated warning labels² was preempted by § 5(b) because it was based on a "state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking," which was "merely the converse of a state law requirement that warnings be included in advertising and promotional materials." Id. at 527. Similarly, the plurality found, a claim alleging that post-1965 advertising was fraudulent because it included imagery associated with "such positive attributes as contentment, glamor, romance, youth, happiness," and suggested that claims based on such allegedly misleading advertising was also preempted. Id. at 527-28.

However, with regard to claims of fraudulent misrepresentation – "most notably claims based on allegedly false statements of material fact made in advertisements" – the plurality found such claims not preempted because they were predicated "not on a duty 'based on smoking and health' but rather on a more general obligation[,] the duty not to

¹ The plurality – Justice Stevens, joined by Justices Rehnquist, White, and O'Connor – concluded that the Labeling Act preempts some but not all common law claims. Id. at 505. Justices Thomas and Scalia took the position that the Labeling Act preempts all state common-law claims, id. at 506-07; while it was the view of Justices Blackmun, Kennedy, and Souter that the Labeling Act does not preempt any state common-law claims, id. at 506.

² The term "warning neutralization" refers to the concept of a "relationship between required warnings and advertising that 'negates or disclaims' those warnings." Cipollone, 505 U.S. at 527-28 (citing 21 C.F.R. § 191.102 (1965)). The Cipollone plurality found such a theory of fraudulent misrepresentation to be inextricably related to one of the failure-to-warn claims which the Court had already found to be largely preempted by § 5(b). Id. at 528.

1 deceive.'" Id. at 528-29. With regard to claims that defendants had concealed material
2 facts, the plurality found the claims not preempted "insofar as those claims rely on a state-
3 law duty to disclose such facts through channels of communication other than advertising
4 and promotion." Id. at 528.

5 The plaintiffs also alleged that the defendants engaged in a conspiracy to
6 misrepresent or conceal information coming from the scientific and medical community
7 concerning the health hazards of smoking. Id. at 530 & n.28. The plurality described the
8 predicate duty underlying this claim as "a duty not to commit fraud," and concluded that it
9 was not preempted for the reasons stated in the analysis of the intentional fraud claim.
10 Id. at 530.

11 In Altria Group, Inc. v. Good, 555 U.S. 70 (2008), the plaintiffs asserted a claim of
12 fraudulent marketing under the Maine Unfair Trade Practices Act ("MUTPA"), which
13 prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce."
14 See Me. Rev. Stat. Ann. tit. 5, § 207. This prohibition encompasses various kinds of
15 behavior, including "a material representation, omission, act or practice that is likely to
16 mislead consumers acting reasonably under the circumstances." Maine v. Weinschenk,
17 868 A.2d 200, 206 (Me. 2005).

18 The plaintiffs alleged that while it was true, as the manufacturers claimed, that the
19 tar and nicotine levels of the "light" cigarettes at issue were lower than those of regular
20 cigarettes, the manufacturers knew that smokers engaged in "compensatory" smoking
21 "behaviors" that negated the beneficial effects of the lower tar and nicotine, and also knew
22 that the increased ventilation that resulted from the cigarettes' unique design features
23 produced smoke that was actually more mutagenic per milligram of tar than that of regular
24 cigarettes. The plaintiffs alleged that the manufacturers had violated the MUTPA by
25 fraudulently concealing that information and by affirmatively representing through the use of
26 "light" and "lowered tar and nicotine" descriptors that their cigarettes posed fewer health
27 risks. See Altria, 555 U.S. at 74.

28 The cigarette manufacturers argued that the Labeling Act preempted the plaintiffs'

1 state-law causes of action. The Supreme Court concluded, as the plurality had in
2 Cipollone, that the Labeling Act does not preempt state-law claims that are predicated on
3 the duty not to deceive – a duty that is not "based on smoking and health" – and that "the
4 phrase 'based on smoking and health,' fairly but narrowly construed, does not encompass
5 the more general duty not to make fraudulent statements." Altria, 555 U.S. at 81 (quoting
6 Cipollone, 505 U.S. at 528-29).

7 In the present case, plaintiff argued in her opposition to defendants' 2012 motion for
8 summary judgment that the negligent failure to warn and the off-label failure-to-warn claims
9 were not preempted by the Labeling Act, to the extent they were based on statements or
10 actions that were unrelated to advertising and promotion, or on warnings that could have
11 been given outside of advertising and promotion.

12 With regard to post-1969 fraud and concealment claims, plaintiff argued that under
13 Cipollone, fraudulent misrepresentation claims that arise with respect to advertising and
14 promotions (most notably claims based on allegedly false statements of material fact made
15 in advertisements) are not preempted by § 5(b) because such claims are not predicated on
16 a duty "'based on smoking and health,' but rather on a more general obligation the duty not
17 to deceive." Similarly, she asserted, the concealment claim was based on defendants'
18 alleged scheme to conceal their knowledge concerning the health hazards of smoking and
19 the addictive nature of smoking, and was not preempted because it alleged a violation of
20 the manufacturers' duty not to deceive – a duty not based on "smoking and health."

21 In the October 22, 2012, order, the court granted defendants' motion as to second
22 cause of action for defective design (and to the first cause of action for negligence to the
23 extent it alleged defective design); as to the third, fourth, sixth, and seventh causes of
24 action for affirmative misrepresentation (fraud and deceit, including negligent
25 misrepresentation); and as to the eighth cause of action for concert of action.

26 The court denied summary judgment as to the fifth cause of action for concealment;
27 as to the first cause of action to the extent it alleged negligent failure to warn; and as to the
28 ninth and tenth causes of action for off-label failure to warn and pre-1969 failure to warn.

1 The court found that triable issues precluded summary judgment as to the concealment
2 and failure-to-warn claims. The court also ruled that the failure-to-warn and concealment
3 claims that were based on events after July 1, 1969, were not preempted by the Labeling
4 Act, to the extent they were not claims of failure to warn or disclose through advertising and
5 promotion. See Oct. 22, 2012 Order, at 22 (citing Cipollone, 505 U.S. at 528).

6 The court noted further that plaintiff had conceded that claims of post-1969 failure-
7 to-warn through advertising and promotion were preempted, but had asserted that neither
8 the ninth cause of action for pre-1969 failure-to-warn, nor any other cause of action based
9 on facts prior to July 1, 1969, was preempted because the Labeling Act does not preempt
10 pre-1969 claims. The court concluded that "to the extent that plaintiff is asserting pre-1969
11 failure to warn, or post-1969 failure to warn that is based on a duty to disclose facts other
12 than through advertising and promotion, such claims are not preempted and may proceed."
13 Id. at 22-23. Plaintiff did not seek reconsideration of any part of the order.

14 B. Plaintiff's Trial Brief (Doc. 261)

15 In accordance with the September 6, 2011 Revised Case Management and Pretrial
16 Order (Doc. 157), plaintiff filed pretrial papers, including a trial brief, on November 1, 2012.
17 In the trial brief, plaintiff argued, with regard to the post-1969 off-label failure-to-warn claim,
18 that for the reasons set forth in Cipollone and Altria, her claims were not preempted by the
19 Labeling Act because they were based on "defendants' duty not to deceive and to warn
20 customers, including the [p]laintiff, of the harm that might occur if defendants' products
21 were used as intended, particularly where, as here, defendants breached an owed duty to
22 [plaintiff] through intentional acts of deception, concealment, suppression of facts, and
23 failure to warn." Pltf's Trial Brief at 22-23.

24 Plaintiff asserted that defendants' "bad acts" imposed legal "duties" on them to warn
25 cigarette users (outside and off the cigarette label) of the health risks of smoking; to
26 disclose to consumers the results of "scientific research known to them" indicating that the
27 use of cigarettes was harmful; and to disclose the ingredients of cigarettes and the
28 presence of additives and alterations to the nicotine levels in cigarette tobacco. Plaintiff

1 contended that defendants had breached each of these duties, none of which was
2 preempted by the Labeling Act. Id. at 23.

3 Plaintiff argued further that the only claims to which Labeling Act preemption applies
4 are post-1969 failure-to-warn through advertising and promotional activities, and that
5 because she had not alleged any cause of action based on defendants' post-1969 failure to
6 warn through advertising and promotional activities, preemption provided no basis for
7 excluding any evidence at trial. She reiterated that "Cipollone is the law on preemption in
8 cigarette cases." Id. at 23-24.

9 C. Initial Final Pretrial Conference

10 On November 29, 2012, the court presided over what was supposed to be the final
11 pretrial conference. During this session, which lasted almost three hours, the court ruled
12 on certain of the parties' motions in limine, and deferred ruling on others to allow further
13 briefing and/or additional efforts by the parties to resolve their differences. The court also
14 issued directives with regard to the trial schedule, and discussed the jury instructions and
15 verdict forms, voir dire and jury questionnaire, and jury selection (including peremptory
16 challenges), as well as plaintiff's exhibit lists, witness lists, deposition designations, written
17 discovery designations, and presentation of evidence regarding damages. The court
18 ordered the parties to meet and confer regarding the jury questionnaire, jury instructions
19 and verdict form, and objections to evidence, and ordered plaintiff's counsel to revise and
20 resubmit plaintiff's designations of witnesses and evidence.

21 Following this, the court raised the issue of Labeling Act preemption, and the duty to
22 disclose facts other than through promotion and advertising, as set forth in Cipollone, 505
23 U.S. at 521-28. The court requested that plaintiff's counsel identify the source of the
24 state-law duty to disclose through channels of communication other than advertising and
25 promotions, which plaintiff had asserted applied in this case. Counsel's response was that
26 the duty was found in California Civil Code § 1714³ "for starters[.]" adding that

27
28 ³ Civil Code § 1714 is California's general negligence statute.

1 [t]he duty is to conduct your affairs so as not to conceal and cause injury to
2 others codified in California Civil Code 1714. But that's usually not what the
3 inquiry is all about on this question. It's usually more of a distinction between
what is on-label and off-label promotion of the product. So I'm not sure what
you're referring to as the pleading that's causing you to have this question.

4 Nov. 29, 2012 Hearing Tr. (Doc. 287), at 90-92.

5 Plaintiff's counsel then explained that "if a tobacco executive is on television and
6 says, 'We've conducted research and the conclusion of the research shows that cigarettes
7 do not cause disease, cigarettes do not cause cancer, when they are concealing the same
8 results they are engaging . . . and referencing . . . " Id. at 93. The court interjected, "[A]ll
9 . . . I needed to hear was whether or not you were asserting that there was some duty
10 other than that that arises from the common law which precludes concealment. . . . Is there
11 some duty owed that is . . . based on a failure to disclose through channels of
12 communication other than promotion and advertisement . . ." as in Cipollone, where the
13 Court "found that the state law claims for fraudulent misrepresentation . . . gave rise to that
14 duty." Id.

15 Counsel could not confirm that the claims of failure to warn and concealment gave
16 rise to such a duty, stating that "this is a murky area in some respects," but adding that "we
17 have – for example, on negligence, the duty of ordinary care to conduct yourself so as to
18 avoid injury to others, a more common, broad-based common law duty of ordinary care."
19 Id. at 94. The court responded, "I'm unaware of any negligence cause of action that's
20 remaining in the case other than with regard to the failure to warn. That's all I found in the
21 summary judgment ruling that was left." The court asked counsel to explain what he meant
22 by "common-law negligence duty." Id.

23 Counsel responded that the court had not dismissed the first cause of action for
24 "general negligence," other than to the extent that it "was based upon the design, the
25 design issue," and asserted that "it's a general garden-variety 1714 negligence claim." Id.
26 at 95. When asked to define the duty that this "garden-variety" claim entailed, counsel
27 referred only to the "duty of ordinary care." Id. at 96-98. The court asked what defendants
28 had done to breach that duty. Plaintiff's counsel responded,

1 They didn't do anything to – but breach that duty. They marketed the – the
2 product. They didn't instruct people on how to use the product. They didn't
3 educate them about the consequences of using the product. They didn't
4 communicate anything about addiction, nicotine, detrimental health effects
from the normal intended use of the product. There's a whole panoply of
things that a product manufacturer should do given the circumstances of their
product to discharge a duty of ordinary care.

5 Id. at 98.

6 Plaintiff's counsel did not claim that the first cause of action actually referenced
7 § 1714, but instead argued that, for example, the assertion that the defendants negligently
8 manipulated, manufactured, and marketed cigarettes – thereby breaching the ordinary duty
9 of care – which was a substantial contributing factor to causing injury to the plaintiff,
10 adequately alleged negligence under § 1714. Id. at 96-100, 103-105.

11 Plaintiff's counsel indicated that “[w]e understood” the October 22, 2012 order to
12 “leave in negligence except to the extent it involved a negligent design claim.” Id. at 104.
13 Nevertheless, it seemed clear that defendants as well as the court had interpreted the first
14 cause of action as largely duplicative of other causes of action asserted in the complaint –
15 in particular the claims of affirmative misrepresentation and defective design – and had
16 concluded that all that remained of the first cause of action after the October 22, 2012 order
17 was a claim of negligent failure to warn of the health risks of smoking.

18 On December 5, 2012, the court issued a Preliminary Final Pretrial Order (Doc. 289)
19 relating to the rulings on the motions in limine and other rulings issued at the November 29,
20 2012 pretrial conference. Because the entirety of the negligence claim that plaintiff
21 appeared to be asserting had not been tested on summary judgment, the court also
22 directed plaintiff to file a statement clarifying the exact nature of the claim she believed
23 remained in the case, setting forth the legal basis for the duty allegedly owed by the
24 defendants, plus the facts supporting the alleged breach of that duty. The court added that
25 before allowing the claim to be tried to a jury, the court would require defendants to either
26 move for summary judgment, or state in writing that in their view, moving for summary
27 judgment would be futile because of the existence of disputed material facts. Dec. 5, 2013
28 Order at 10-13.

1 With the emphasis on the question of what if anything remained of the negligence
2 cause of action, the questions posed by the court regarding the issue of Labeling Act
3 preemption of plaintiff's failure to warn and concealment claims and the source of the state-
4 law duty to disclose facts other than in advertising and promotions remained unclarified,
5 and the focus temporarily turned to the negligence claim and the allegations of duty to
6 support that claim.

7 Plaintiff filed the statement regarding the first cause of action for negligence on
8 December 12, 2012 (Doc. 293), arguing that from 1954, when defendants published the
9 document entitled "A Frank Statement to Cigarette Smokers," they knew that use of their
10 products presented serious health problems, and that they nonetheless failed to exercise
11 the prudence and care an ordinary person would have exercised in the same
12 circumstances to avoid harm to their consumers, and in so doing, breached their duty of
13 reasonable care to the plaintiff.

14 On January 9, 2013, defendants filed a motion for partial summary judgment (Doc.
15 300), seeking a ruling confirming that plaintiff had no remaining viable negligence claims
16 apart from negligent failure to warn, or, in the alternative, an order granting partial summary
17 judgment as to any remaining negligence claim apart from negligent failure to warn. In
18 addition, proceeding outside the scope of the court's prior order, defendants sought an
19 order limiting plaintiff's remaining claims to the period prior to July 1, 1969, and dismissing
20 all remaining claims against H&K.

21 Plaintiff filed an opposition to defendants' motion on January 23, 2013, arguing the
22 complaint adequately stated a claim for negligence, and that her negligence claim was
23 supported by law. In addition, she asserted that defendants were improperly seeking
24 reconsideration of the court's prior rulings, and that Labeling Act preemption does not apply
25 to concealment claims because concealment claims are based on a duty not to deceive
26 (citing Cipollone, 505 U.S. at 528-29). She also reiterated that she was not asserting a
27 claim for post-1969 failure-to-warn, but also that Labeling Act preemption does not apply to
28 her claim of off-label failure-to-warn, including post-1969 off-label failure to warn.

1 Following a hearing on February 13, 2013, lasting an hour and forty-five minutes, at
2 which time the court addressed (among other things) the ongoing issues with regard to
3 damages discovery, and with regard to plaintiff's proposed witness list, proposed deposition
4 designations, and proposed exhibit list, and defendants' objections thereto, see Feb. 13,
5 2013 Hearing Tr. (Doc. 311), the court on February 15, 2013, issued a Second Final
6 Pretrial Order (Doc. 310) in which it directed further briefing. On May 22, 2013, the court
7 issued an order on defendants' motion for partial summary judgment.

8 D. The May 22, 2013 Order re Defendants' Motion for Partial Summary Judgment
9 (Doc. 319)

10 The court first addressed the first cause of action for negligence, finding that plaintiff
11 had alleged negligent manipulation (design), manufacture, and various other actions
12 (marketing, advertising, distribution, and selling) in the first cause of action for negligence,
13 all of which were subsumed by causes of action that had previously been dismissed, with
14 the exception of one claim. That finding clarified that the only negligence claim remaining
15 against the manufacturer defendants was the claim of negligent failure to warn.

16 Second, the court addressed the negligence and fraud/deceit claims asserted
17 against H&K, finding that plaintiff had conceded she had no failure-to-warn claim against
18 H&K, and no other negligence claim remained in the case; that to the extent that plaintiff
19 was attempting to allege misrepresentation, all such claims had been dismissed from the
20 case; and that plaintiff could not establish a concealment claim because she had not
21 identified a relationship between herself and H&K in which a duty to disclose could arise.

22 Third, the court addressed the post-1969 claims. The court noted that the October
23 22, 2012 order re defendants' motion for summary judgment had held that under Cipollone,
24 claims for fraudulent concealment or failure to warn in advertising and promotions after July
25 1969 are preempted unless they rely on a state-law duty to disclose facts through channels
26 of communication other than advertisement or promotion; and that to the extent these
27 claims pre-date 1969, or (if post-1969) are based on a duty to disclose facts other than
28 through advertising and promotion, then such claims are not preempted and may proceed.

1 May 22, 2013 Order, at 15 (citing Oct. 22, 2012, Order at 23)).

2 In their motion, defendants argued that plaintiff could not establish a duty to warn or
3 to disclose facts outside advertising and promotion after July 1, 1969, as she had identified
4 no source for any such duty to warn or disclose. In the order, the court noted that it had
5 asked plaintiff's counsel at the November 29, 2012 hearing to identify the source of the
6 state-law duty to disclose through channels of communication other than advertising and
7 promotion, and that the only specific source plaintiff's counsel mentioned was Civil Code
8 § 1714 (the general negligence statute), although counsel also made reference to the
9 common law precluding fraudulent concealment. Id. (citing Nov. 29, 2012 Tr. at 90-94).

10 The court further noted that in her July 9, 2012 opposition to defendants' original
11 motion for summary judgment, plaintiff had agreed that the failure-to-warn claims are
12 limited to the pre-1969 period, but that she also asserted that the Labeling Act preemption
13 does not apply to the off-label failure to warn claims (claims not based on advertising and
14 promotion), which she argued include the failure to warn of the negative health effects of
15 smoking. The court found, however, that plaintiff had failed to provide the source of any
16 state-law duty to disclose facts other than through advertising and promotion, which would
17 suffice to remove the off-label failure-to-warn claims from the preemptive effect of the
18 Labeling Act. Id. at 15. For this reason, the court concluded that Labeling Act preemption
19 applied to any portion of the claim of negligent failure-to-warn based on post-1969 actions
20 (as to any other failure-to-warn claim). Id. at 16.

21 E. The July 19, 2013 Third Final Pretrial Order (Doc. 337)

22 On July 12, 2013, the court conducted a further pretrial conference, lasting almost
23 four hours. See July 12, 2013 Hearing Tr. (Doc. 341). On July 19, 2013, the court issued
24 the Third Final Pretrial Order (Doc. 337). In that order, the court addressed the on-going
25 problems with the plaintiff's deposition designations, and ruled on defendants' categorical
26 objections to the designations; issued rulings with regard to a number of the disputed jury
27 instructions, and ordered the parties to meet and confer regarding others; again ordered
28 the parties to meet and confer regarding the joint verdict form; attempted to impose a

1 workable method for reducing the number of exhibits on plaintiff's exhibit list; and issued
2 rulings on remaining deferred motions in limine.

3 In addition, the court summarized the claims remaining in the case – concealment
4 and the two pre-1969 failure-to-warn claims. The court ruled that under Cipollone, the
5 concealment claim is not subject to wholesale preemption by the Labeling Act because Civil
6 Code § 1710, the state law identified by plaintiffs, does not impose a prohibition "based on
7 smoking and health." July 19, 2013 Order at 14.

8 The court noted that plaintiff could have pursued a claim of post-1969 failure to
9 warn, to the extent it was not based on the defendant tobacco companies' packaging,
10 advertising, or promotional material, but that plaintiff had failed to cite a source of a state-
11 law duty to disclose facts other than through advertising and promotion. Id. Thus, the court
12 concluded, for the period July 1, 1969 to January 1, 1988, the only evidence that will be
13 admissible is evidence to support plaintiff's claim of fraudulent concealment; that no
14 evidence relating to post-1988 (immunity period) conduct will be admissible; and any claim
15 that defendants' post-1969 advertising or promotions should have included additional, or
16 more clearly stated, warnings regarding safety or health is preempted. Id.

17 F. March 27, 2014 Further Final Pretrial Conference

18 On March 27, 2014, the court conducted a further final pretrial conference, lasting
19 an hour and a half. See March 27, 2014 Hearing Tr. (Doc. 378). At the hearing, the court
20 addressed the ongoing issues with exhibit lists, witness lists, and deposition designations
21 and counter-designations. See id. The court also reviewed and ruled on the remaining
22 disputed jury instructions. The final instruction that was discussed was the concealment
23 instruction. In that regard, the court stated that "[o]ne of the issue we're going to have to
24 discuss today is the post-1969 evidence that does not relate to advertising or promotion[,]"
25 and asked plaintiff's counsel to identify it. Id. at 19-20.

26 Plaintiff's counsel responded, "We don't believe the Frank Statement fits into that
27 category." The court asked, "Was it made after 1969?" Counsel responded, "No. But
28 that's the substance. It's the root source of the concepts where corruption of understanding

1 of cancer, cancer causation, is not product promotion or advertising. It's a different thing
2 rooted in the 1954 Frank Statement and the course thereafter that the evidence will
3 demonstrate." Id. at 20. The court again asked, "[W]hat is the post-1969 evidence that
4 does not relate to advertising and promotion?" Plaintiff's counsel repeated that the Frank
5 Statement "sets the pattern and practice that transcends '69 where the defendants are
6 continuing that practice to corrupt understanding about what they knew about the dangers
7 of smoking." Id.

8 Again the court asked, "[W]hat's the specific evidence that you're seeking to admit
9 that's post-1969 that has nothing to do with advertising and promotion?" Counsel
10 responded that it "comes in the form of the defendants' representative speaking to the topic
11 of dangers associated with use of their product, risks of cancer, talking about science,
12 concepts independent of product promotion or advertising more – more rooted in science."
13 Id. at 20-21. The court asked whether counsel could identify the specific items of evidence,
14 and counsel responded. "It's in the deposition excerpts that have been page lined through
15 various former executives, Mr. Bible, Dr. Cook, others that we have page lined who speak
16 to the notion that it is not demonstrated that their products cause injury . . . It has nothing to
17 do with them endeavoring to promote their product, try and sell more of it." Id. at 21. He
18 added, "They're trying to communicate what they believe to be the medicine and the
19 science, denying that their products create any danger associated with cancer, that it has
20 not been proven." Id.

21 Following this exchange, the court directed plaintiff to file an offer of proof with an
22 identification of the evidence. Id. at 22-23. The court also issued a Fifth Final Pretrial
23 Order (Doc. 376) on April 2, 2014, summarizing the rulings at the pretrial conference.

24 **PLAINTIFF'S OFFER OF PROOF**

25 A. Offer of Proof

26 Plaintiff begins by arguing that under Altria, Labeling Act preemption does not apply
27 to state-law based concealment claims that are predicated on a duty not to deceive, and it
28 does not "limit or modify the evidentiary basis of such concealment claims," and that

1 preemption is limited to "certain types of failure to warn/neutralization claims." She
2 contends that because Civil Code §§ 1709 and 1710 are not state law requirements based
3 on "smoking and health," but rather are state laws establishing a duty not to deceive,
4 Labeling Act preemption is not applicable to her post-1969 concealment claim.

5 Plaintiff also asserts that concealment claims can be based on affirmative
6 statements. She cites § 1710, which provides that concealment occurs when a defendant
7 gives "information of other facts" that are "likely to mislead" and CACI 1901 ("Defendant
8 disclosed some facts to [p]laintiff but intentionally failed to disclose other important facts.")
9 She contends that one cannot give "information of other facts" or "disclose some facts"
10 without making affirmative statements. She asserts that the difference between an
11 intentional misrepresentation claim and a concealment claim is that misrepresentation
12 involves making affirmative statements knowing them to be false, while concealment
13 involves making affirmative statements that are true but also concealing or intentionally
14 failing to disclose facts that materially qualify those stated.

15 Plaintiff argues that defendants breached their duty not to deceive under California
16 law when they elected to speak to the public, including plaintiff, regarding health claims
17 associated with the use of their products. She asserts that because defendants made
18 public statements, they were obligated to provide the entire truth, but that they instead
19 disclosed only some selected facts and half-truths, while concealing other facts, thereby
20 creating a "false controversy concerning the adverse health effects of smoking."

21 Plaintiff also contends that defendants had the intention of causing smokers,
22 including herself, to rely on the substance of that misinformation, and that she did
23 reasonably rely on defendants' deception. She notes that in ruling on defendants' motion
24 for summary judgment, the court found that disputed issues of fact remained "as to
25 whether plaintiff might have made different decisions at various times had she been aware
26 of certain health risks or whether she would have smoked a 'safer' cigarette had
27 [d]efendants manufactured one" (quoting Oct. 22, 2012 Order at 20). Plaintiff also claims
28 proving a concealment claim in a smoking case under California law does not require

1 establishing that the plaintiff relied on specific individual false statements, where the
2 misrepresentations and false statements are part of an extensive and long-term advertising
3 campaign.

4 Following these arguments, plaintiff discusses the evidence – consisting of 101
5 exhibits – which she cites in support of the concealment claim. Some of this evidence
6 predates the effective date of the Labeling Act (particularly some of the evidence discussed
7 in the first subsection), but most of it is post-1969 (though some of the deposition or trial
8 testimony relates to events pre-1969).

9 a. Evidence of defendants' concealment

10 Plaintiff first discusses the history of smoking-related lung cancer, primarily in the
11 U.S. but also in England, beginning with a sharp rise in the number of cases of cancer in
12 the 1930s and 1940s, and a growing recognition among medical doctors in the 1950s and
13 early 1960s of the connection between smoking and lung cancer, followed by the public
14 response of the cigarette manufacturers during the period from the late 1950s through the
15 mid-1980s.

16 The attached evidence includes excerpts of deposition transcripts and transcripts of
17 trial testimony from other cases (primarily in the State of Florida); opinions in expert reports;
18 reports in American and British scientific publications in the 1950s of studies regarding the
19 relationship between smoking and cancer; documents (including excerpts of deposition
20 testimony) relating to the manufacturers' hiring of H&K in 1953, and H&K's subsequent
21 public relations work, including preparation and publication of the "Frank Statement" in
22 January 1954; documents (including deposition excerpts) relating to the formation of
23 industry groups the Tobacco Industry Research Committee (which later became the
24 Council for Tobacco Research) and the Tobacco Institute – and publications issued by both
25 from the mid-1950s to the early 1960s; and U.S. Government reports on smoking and
26 health in the early to mid-1960s.

27 Second, plaintiff discusses the public response of the Tobacco Institute, the
28 American Tobacco Company (now RJR), and Philip Morris in the late 1950s and through

1 the 1960s and into the 1970s with regard to the issue of the relationship between smoking
2 and lung cancer; and the efforts made by Philip Morris and the American Tobacco
3 Company (RJR) to increase sales, including use of advertising and efforts to study smoking
4 behavior with a view to getting more people (including youth smokers) to smoke more
5 cigarettes. The attached evidence regarding the public response of RJR and Philip Morris,
6 and the Tobacco Institute includes deposition testimony, company documents (including
7 press releases), and Federal Trade Commission reports.

8 Third, plaintiff discusses the theory that because of defendants' "open question"
9 approach to the smoking/cancer issue, many smokers in the mid-1970s did not accept that
10 smoking causes cancer. She also discusses research on smoking and cancer performed
11 by defendants and the Council for Tobacco Research from the late 1960s and through the
12 1970s, which they allegedly "concealed" from consumers. The attached evidence includes
13 deposition excerpts and company documents.

14 Fourth, plaintiff discusses defendants' public responses (and the responses of the
15 Tobacco Institute) in the 1980s to the question of the connection between smoking and
16 lung cancer – generally that there is no proven causal link between the two. The attached
17 evidence includes deposition testimony, Congressional hearing testimony, FTC reports,
18 company documents, and Tobacco Institute reports and public releases.

19 Fifth, plaintiff discusses the anticipated proposed testimony of her expert Dr. William
20 Farone (who was employed at Philip Morris from 1976-1984), to the effect that his
21 supervisors at Philip Morris told him smoking was addictive and caused cancer, and that
22 those facts were generally understood at Philip Morris as early as the mid-1970s; and to
23 the effect that Philip Morris intentionally attempted to create doubt in the minds of the public
24 as to whether smoking was addictive and/or caused cancer. The attached evidence
25 includes excerpts from judicial opinions in other cases describing Dr. Farone's trial
26 testimony in those cases. It also includes Dr. Farone's November 2011 expert report.

27 b. Specific evidence relating to Philip Morris

28 This section consists of references to "admissions" by Philip Morris at various times

1 regarding health/cancer/smoking and the addictive effects of nicotine. The attached
2 evidence consists of excerpts from 2011-2012 deposition testimony by Philip Morris
3 representatives Richard Jupe and Peter J. Lipowicz, and excerpts of March 1998 trial
4 testimony by former Philip Morris CEO Geoffrey Bible (now deceased).

5 c. Specific evidence relating to RJR

6 This section consists of references to "admissions" by RJR at various times
7 regarding health/cancer/smoking and the addictive effects of nicotine, as well as
8 "admissions" regarding what it did or did not tell the public about these facts. The attached
9 evidence consists of excerpts from 2011 deposition testimony by RJR representatives Jeff
10 Gentry, Christopher Cook, and Dr. James Figlar.

11 d. Evidence in the form of planned trial testimony

12 In this section, plaintiff discusses her anticipated trial testimony regarding how she
13 came to start smoking; why she couldn't quit smoking and what efforts she made to quit;
14 what she knew or did not know at various times about the relationship between smoking
15 and health; whether and to what extent she relied on defendants' public statements
16 regarding the risks of smoking; and what she believed about low-tar/low-nicotine cigarettes
17 or "light" cigarettes, and whether they were healthier than regular cigarettes. In support,
18 plaintiff cites to her declaration filed on July 9, 2012 in opposition to defendants' motion for
19 summary judgment, and to excerpts from her deposition testimony from November and
20 December 2006.

21 This section also describes proposed trial testimony of plaintiff's pulmonologist,
22 Barry Horn, M.D., whom plaintiff anticipates will testify that plaintiff's smoking cigarettes
23 was the cause of her lung cancer. In this section, plaintiff cites to Dr. Horn's declaration
24 filed July 9, 2012, in opposition to defendants' motion for summary judgment.

25 B. Defendants' Response

26 Defendants argue that plaintiff is improperly seeking reconsideration of the court's
27 prior rulings on preemption by arguing that there is "no legal basis" for those rulings and
28 that "Labeling Act preemption . . . is not applicable at all to state-law-based fraud claims"

1 (quoting Offer of Proof at 1-2).

2 Defendants assert that under the standard articulated in Cipollone, post-1969 fraud
3 claims predicated on a state-law prohibition against statements in advertising and
4 promotional materials that tend to minimize the health hazards associated with smoking are
5 preempted, as are fraud claims based on allegedly "misleading" post-1969 advertising
6 imagery associating smoking with "glamor" or "happiness" or other "positive attributes." By
7 contrast, they assert, fraud claims premised on allegedly false statements made in
8 advertisements are not preempted, because while they involve advertising or promotion,
9 they are not also predicated on smoking and health, but rather are based on the "duty not
10 to deceive."

11 As for the concealment claim, defendants reiterate that such claims are not
12 preempted insofar as they rely on a state law duty to disclose such facts through channels
13 of communication other than advertising and promotion. Defendants note that in this case,
14 the court has already ruled that plaintiff's claims regarding post-1969 conduct are
15 preempted by the Labeling Act to the extent they rely on a state-law requirement or
16 prohibition with respect to smoking or health in connection with advertising or promotion of
17 cigarettes. They assert that to the extent that plaintiff is asserting that defendants
18 concealed material facts about safety and health effects of smoking in the post-1969
19 period, she must provide evidence of such concealment apart from advertising and
20 promotion.

21 Defendants argue, however, that the evidence presented does not establish a post-
22 1969 concealment claim based on a duty to disclose facts through channels of
23 communication other than advertising and promotion. Defendants contend that plaintiff
24 appears to be asserting that this court should ignore Cipollone as having been superceded
25 by Altria. Defendants assert, however, that the Court in Altria expressly rejected the
26 contention that the Cipollone framework should be discarded, and that the Court's opinion
27 shows that it understood the plaintiffs' claims to be based on false statements of fact, not
28 mere concealment. They note that the Court specifically stated, "As was true of the claim

1 in Cipollone, respondents' claim that the deceptive statements 'light' and 'lowered tar and
2 nicotine' induced them to purchase petitioners' product alleges a breach of the duty not to
3 deceive." See 555 U.S. at 82-87.

4 Defendants argue that plaintiff has not attempted to explain how she would comply
5 with the limitations this court has placed on her concealment claims post-1969, and argue
6 that the Offer of Proof shows that she cannot. Defendants note that plaintiff sets forth in
7 her brief the elements of the concealment claim she says she intends to prove, but omits
8 any reference to pre- or post-1969 (citing Offer of Proof at 3 (listing elements of CACI
9 1901)). They also note that she now appears to be asserting only one of the four
10 alternatives in the first element of CACI 1901, which requires the plaintiff to prove that
11 defendants "disclosed some facts to [p]laintiff but intentionally failed to disclose other
12 important facts, making the disclosure deceptive."

13 Defendants speculate that this might be why plaintiff now is arguing that
14 "concealment claims can be based on affirmative statements." While defendants agree
15 with this basic premise, they argue that it is true only in the sense that a duty to disclose
16 may arise from a partial disclosure made "to the plaintiff," which deceived the plaintiff into
17 acting in a way she would not have acted if the disclosure had been complete.

18 However, defendants contend, the court has already found that plaintiff has no
19 evidence that she was influenced by any disclosure by either defendant. In support,
20 defendants cite the ruling in the October 22, 2012 order re defendants' motion for summary
21 judgment, in which the court granted summary judgment on the claims of affirmative
22 misrepresentation, "because plaintiff has provided no evidence that she relied on any
23 particular representation made by the defendants," and "was unable to identify any specific
24 misleading statements relating to smoking and health." Oct. 22, 2012 Order at 17-18.
25 Defendants claim that the theory plaintiff now proposes to prove would fail for the same
26 reason her claims of affirmative misrepresentation failed.

27 In their second main argument, defendants assert that the evidence proffered by
28 plaintiff does not establish a post-1969 concealment claim based on breach of a duty to

1 disclose facts through channels of communication other than advertising and promotion.
2 First, they contend that plaintiff's evidence does not establish a duty arising from any
3 "partial disclosure" – an affirmative statement that was misleading because it did not
4 include all information necessary in order to make it not misleading. Defendants note that
5 in the October 22, 2012 order re defendants' motions for summary judgment, the court
6 dismissed plaintiff's affirmative-misrepresentation claim based on its finding that plaintiff
7 "did not recall having ever read or heard (much less relied on) any specific statement
8 regarding smoking and health" in advertising or promotion or otherwise.

9 Indeed, defendants assert, plaintiff's Offer of Proof avoids identifying any public
10 communications at all, as she points to only general "communications" without showing
11 when or where they were made, or by whom, and whether they were made to "plaintiff" as
12 defendants assert CACI 1901 requires. Defendants argue that sweeping statements
13 referring generically to "communications" cannot suffice because they are impossible to
14 attribute to something that reached plaintiff through channels of communication outside
15 advertising and promotion.

16 For example, defendants cite to Offer of Proof ¶ 86 (deposition testimony by RJR
17 representative Figlar that even after the 1979 Surgeon General's report, RJR continued to
18 "assert publicly" that a link between smoking and cancer was not scientifically established;
19 id. ¶ 116 (deposition testimony by Philip Morris representative Jupe that Philip Morris
20 continued to state for decades after Surgeon General's report that mechanism by which
21 cigarette smoking causes cancer had not been proven; and id. ¶ 148 (deposition testimony
22 by RJR representative Cook that RJR continued to publicly deny that smoking causes
23 cancer until late 1990s (after plaintiff had quit smoking). However, defendants argue,
24 plaintiff offers no proof that these representations were communicated to her other than
25 through advertising and promotion. They assert that this is not "specific evidence"
26 supporting the post-1969 concealment claim, as the court ordered plaintiff to provide.

27 Defendants also note that plaintiff attributes certain representations to the Tobacco
28

Institute (citing id. ¶¶ 37, 39, 84-85, 87, 92⁴), but notes that the court previously held that plaintiff "never heard, saw, read, or relied on statements made by . . . TI" (citing May 22, 2013 order re defendants' motion for partial summary judgment (Doc. 319)). Thus, defendants argue, as to those representations, there can be no evidence that such "partial disclosures" could have caused her to act differently than she otherwise would have, had the disclosure been "complete."

Similarly, defendants contend that there is no proffer that plaintiff saw, heard, or read about the testimony of an RJR executive before Congress on March 12, 1982, or that she heard about a report presented by the Tobacco Institute to Congressional committee in 1984, or that she watched NBC's "Nightline" on February 2, 1984, where RJR's former Chairman of the Board stated that "science has still failed to establish a causal link" between smoking and cancer (citing Offer of Proof ¶¶ 91, 93, 94).

Finally, with regard to the evidence submitted by plaintiff in the form of citations to testimony in her declaration, see id. Exh. 93 (originally filed July 9, 2012 in opposition to defendants' motion for summary judgment), cited in id. ¶¶ 151, 156, 165, 167, 171, 173, or to various excerpts from her deposition testimony, id. Exhs. 95-97, cited in id. ¶¶ 157-164, defendants contend that the court previously considered the same statements from plaintiff and concluded that plaintiff had failed to show she ever encountered any specific statement from defendants about smoking and health.

Second, defendants contend that plaintiff's evidence does not otherwise establish any duty to disclose important facts outside advertising and promotion. Defendants concede that plaintiff has pointed to some information she did not have, but argue that she has not explained how a duty to disclose that information could have arisen in the absence of some representation about it.

For example, defendants assert, testimony by company representatives that Philip

⁴ However, the statements in ¶¶ 37 and 39 are also attributed to "defendants," and the statement in ¶ 92 was allegedly made by the Tobacco Institute as spokesman for "the tobacco industry, including [RJR]."

1 Morris and RJR kept up with the available medical and scientific literature, id. ¶¶ 120, 145,
2 does not show that defendants had exclusive knowledge that plaintiff could not have
3 obtained. Nor, defendants argue, does it show “active concealment,” and indeed, does not
4 even show anything was actually concealed.

5 Defendants claim that the same can be said of testimony by RJR representatives
6 Figlar and Gentry that RJR did not conduct studies comparing its cigarettes with those of its
7 competitors, id., ¶ 140; or testimony by Philip Morris representative Jupe that Philip Morris
8 studied whether nicotine was addictive, id. ¶ 107; or testimony by RJR representative Cook
9 that RJR never told its customers to stop buying its product, id. ¶ 147; or testimony by
10 former Philip Morris CEO Bible that Philip Morris viewed customer health and profits
11 equally, id. ¶ 117; or testimony by former Philip Morris CEO Bible that Philip Morris
12 acquired a research facility in Germany in 1970 so it could “conceal research from
13 consumers,” id. ¶ 74; or testimony that RJR and Philip Morris “destroyed,” “buried,” or
14 “tightly controlled” cigarette research, id. ¶¶ 76-82, 88; or testimony by Philip Morris
15 representative Jupe that Philip Morris has never taken a public position on the number of
16 cigarettes per day one should smoke, id. ¶ 111.

17 Defendants argue that plaintiff fails to explain how any of this evidence shows some
18 important fact that defendants had a duty to disclose after 1969, let alone what form
19 defendants should have used to communicate it. Defendants contend that this evidence
20 appears to have been selected to suggest that defendants acted reprehensibly, but they
21 argue that that is not the issue that the court asked plaintiff to address, and it has nothing to
22 do with preemption. Similarly, defendants assert, plaintiff identifies internal reports and
23 memoranda that were not publicly disclosed (citing id. ¶¶ 62, 64, 66, 69-72, 83), but does
24 not explain what important facts they contained that defendants had a duty to disclose, let
25 alone a duty to disclose them outside advertising or promotion.

26 As for plaintiff's citation to her own testimony about information she supposedly did
27 not know (even after federal warnings containing such facts began appearing) – e.g., id.
28 ¶ 168 (plaintiff didn't know smoking caused cancer until decades after Surgeon General's

1 1964 report); id. ¶ 171 (plaintiff believes she "may have been able to stop using cigarettes
 2 sooner" than 1991 if she had known smoking caused lung cancer); id. ¶ 73 (describing
 3 consumer survey of beliefs of smokers "like" plaintiff, some of whom allegedly did not know
 4 smoking causes lung cancer) – defendants reiterate that there is no cause of action for lack
 5 of knowledge, or even for a mere failure to disclose, and a concealment cause of action
 6 must be based on breach of a duty to disclose. Here, defendants argue, the question is
 7 how that duty arose after 1969 despite the federal warnings, and how such a duty could be
 8 discharged after 1969, outside advertising and promotion.

9 Third, defendants assert that plaintiff has improperly included evidence of post-1969
 10 advertising or promotion. They contend that it is indisputable that no duty to disclose after
 11 1969 could be premised on post-1969 advertising and promotion, because that is exactly
 12 what is precluded by the Labeling Act. Moreover, they argue, due to the combined effect
 13 of the California immunity period and plaintiff's stop-smoking date, no evidence will be
 14 admissible in this action relating to defendants' post-1987 knowledge, statements, or public
 15 positions. Defendants argue that none of the evidence cited here helps plaintiff establish
 16 her proposed post-1969 concealment claim, and that in offering it, plaintiff has violated
 17 more of the court's rulings.

18 Defendants list the following as examples of such impermissible evidence – id. ¶ 48
 19 (testimony by former Director of Consumer Research that Philip Morris approved its own
 20 advertising); id. ¶ 90 (testimony by former Philip Morris spokesperson Jeanne Bonhomme
 21 relating to FTC report concerning cigarette advertising published between 1964-1981); id.
 22 ¶ 101 (describing 1985 RJR "public statement," which plaintiff identifies as an
 23 "advertisement"); id. ¶ 118 (testimony by former Philip Morris CEO Bible re Philip Morris
 24 advertisements during period from 1954 (when plaintiff started smoking) through time she
 25 quit; id. ¶ 141 (testimony by RJR representative Cook that he was not aware of RJR
 26 "voluntarily putting a warning label on any advertisement"); id. ¶¶ 134, 136-138, 150
 27 (testimony by RJR representative Gentry re positions RJR took in 2000 regarding smoking
 28 cigarettes); id. ¶ 132 (testimony by RJR representative Cook that RJR did not publicly

1 admit that smoking was addictive until late 1990s, after plaintiff quit smoking); id. ¶¶ 126-
2 127 (testimony by Philip Morris representative Lipowicz re positions Philip Morris took in
3 2000 regarding smoking cigarettes); id. ¶¶ 110-111 (testimony by Philip Morris
4 representative Jupe re position Philip Morris took in 2011 regarding smoking and lung
5 cancer).

6 Fourth, defendants argue that plaintiff continues to offer cigarette-design evidence in
7 violation of prior court rulings. Defendants note that the court dismissed the design claim,
8 found cigarette-design evidence inadmissible and irrelevant as to any remaining claim, and
9 precluded Dr. Farone from testifying about it. Yet, defendants assert, plaintiff now says she
10 plans on asking Dr. Farone to tell the jury that Philip Morris could have replaced the
11 nicotine in its cigarettes with nicotine analogs "that would produce the same addictive
12 effects but without the adverse cardiovascular effects of nicotine" (quoting id. at ¶ 99).

13 Defendants contend that this is design evidence, which would also violate another
14 order in the case because it relates to cardiovascular disease, an injury not at issue in this
15 case. Defendants point to other evidence that appears to violate the same orders,
16 including id. ¶ 103 ((testimony by Philip Morris representative Jupe that cigarette smoking
17 results in brain changes); id. ¶ 108 (testimony of former Philip Morris CEO Bible regarding
18 effects of nicotine addiction); id. ¶ 131 (testimony of RJR scientist Gentry cigarettes are
19 "significantly risky"); id. ¶ 135 (testimony of RJR executive Cook regarding the flavor of low-
20 nicotine cigarettes); id. ¶ 168 (plaintiff's statement that she would have smoked safer
21 cigarettes had they been available).

22 ANALYSIS

23 As indicated above, notwithstanding numerous orders issued by the court, plaintiff
24 continues to assert that no part of the concealment claim is preempted, and that she is
25 entitled to put on evidence from any period prior to 1988, relating to concealment in
26 advertising and promotion (or any other vehicle of communication) regarding the health
27 effects of smoking. Plaintiff's Offer of Proof, which is a jumbled and overblown
28 conglomeration of re-argument of issues already decided by the court and citations to

1 evidence that in some instances is irrelevant or was previously excluded by the court, is
2 premised on this untenable theory that Labeling Act preemption does not apply in this
3 case.

4 Any claim that requires a showing that the defendants' post-1969 advertising or
5 promotions "should have included additional, or more clearly stated, warnings" is
6 preempted. Cipollone, 505 U.S. at 524. Similarly, any claim that defendants made
7 statements or used images in cigarette advertising or promotional materials that "tend[ed]
8 to minimize the health hazards associated with smoking," such as by associating smoking
9 with positive attributes such as "contentment, glamour, romance, youth, [or] happiness" is
10 also preempted. Id. at 527. Even if not specifically labeled "failure to warn," such claims
11 necessarily contend that the federal warnings are not sufficient to warn, and so are
12 preempted. See id.

13 On the other hand, claims of breach of express warranty are generally not
14 preempted, nor are claims of fraudulent misrepresentations in advertising and promotion,
15 as a claim based on an allegedly false statement of material fact in an advertisement is not
16 predicated on a duty relating to "smoking and health," but rather on the "more general
17 obligation . . . not to deceive." Id. at 528-29. A claim of fraudulent concealment is
18 predicated on a state-law duty not to conceal material facts, and a claim that the
19 defendants concealed material facts is thus not preempted insofar as that claim relies "on a
20 state-law duty to disclose such facts through channels of communication other than
21 advertising or promotion," as where a state law obliges manufacturers to disclose material
22 facts about smoking and health to an administrative agency. Id. at 528.

23 It is generally agreed that the Cipollone plurality's opinion regarding Labeling Act
24 preemption is difficult to apply. The Supreme Court itself recognized that the
25 Cipollone preemption framework "lack[s] 'theoretical elegance,'" Altria, 555 U.S. at 84
26 (quoting Cipollone, 505 U.S. at 530 n.27), and numerous courts have agreed. The
27 California Court of Appeal commented that the difficulty is "due not only to the various
28 concurring and dissenting opinions making up a majority on different parts of the decision

1 [citing Cipollone, 505 U.S. at 553-54 (con. & dis. opn. of Blackmun, J.; id. at 555 (con. &
2 dis. opn. of Scalia, J.)], but more fundamentally due to the inherent contradiction at the core
3 of the case." Whitely v. Philip Morris, Inc., 117 Cal. App. 4th 635, 669-70 (2004).

4 In Altria, which followed Cipollone, the Court found that the claim at issue – that
5 statements in advertisements and elsewhere that the cigarettes at issue had less tar and
6 lower nicotine than other cigarettes were deceptive and induced the plaintiffs to purchase
7 the cigarettes – alleged a breach of the duty not to deceive. Id., 555 U.S. at 82. While the
8 court conceded that the presence of the warnings on the packages might bear on the
9 materiality of the allegedly fraudulent statements, the court emphasized that the claim was
10 a claim about deceptive statements, not a claim about warnings about smoking and health.
11 Id. at 82-83. The Court found nothing in the Labeling Act's purpose that otherwise limits the
12 States' authority to prohibit deceptive statements in cigarette advertising. Id. at 79-80.

13 However, the Court confined its analysis to the claim that the manufacturers had
14 made affirmative misrepresentations. The Court found it "clear that our holding in
15 Cipollone that the common-law fraud claim was not pre-empted is directly applicable to the
16 statutory claim at issue in this case," adding, "[a]s was true of the claim in Cipollone,
17 respondents' claim that the deceptive statements 'light' and 'lowered tar and nicotine'
18 induced them to purchase [the manufacturers'] product alleges a breach of the duty not to
19 deceive." Id. at 82.

20 Both Altria and Cipollone analyzed the claims at issue as affirmative
21 misrepresentation claims – not as claims of fraudulent concealment. In the present case,
22 there are no claims of affirmative misrepresentation remaining. Plaintiff's concealment
23 claim appears to be premised on the theory that defendants made public statements
24 regarding smoking and health, and that while the statements may have been true, they
25 were rendered misleading by defendants' failure to include additional statements
26 concerning the negative health effects of smoking. However, because plaintiff has not
27 precisely identified the statements at issue, it is impossible to ascertain the exact basis of
28 the concealment claim. Nevertheless, to the extent that any of these statements were

1 made in advertising or promotions after 1969, when Labeling Act warnings were mandated,
2 such a claim is preempted by the Labeling Act because it is indistinguishable from a claim
3 alleging that defendants failed to include additional warnings regarding smoking and health
4 in advertising and promotions.

5 Turning to defendants' response, the court notes that defendants have attacked
6 plaintiff's Offer of Proof largely as though it were a motion for summary judgment. An offer
7 of proof is normally made after the court has sustained an evidentiary objection, with the
8 purpose of establishing a record for appeal. See Wright, Miller & Kane, 21 Federal Practice
9 & Procedure (2d ed. 2014) Evid. § 5040. The intent is to show the substance of the
10 would-be evidence and the purpose for which a party sought to introduce it. See Fed. R.
11 Evid. 103; see also Heyne v. Caruso, 69 F.3d 1475, 1481 (9th Cir. 1994); Pau v. Yosemite
12 Park and Curry Co., 928 F.2d 880, 887 (9th Cir. 1991).

13 Federal Rule of Evidence 103 does not define "offer of proof," although the Advisory
14 Committee Notes for 1972 refer to "similar provisions" in the California Evidence Code.
15 Under California Evidence Code § 354, an "offer of proof" is a statement by counsel
16 describing proposed evidence and what he or she intends to prove if such evidence is
17 admitted. Cal. Evid. Code § 354(a). In this case, given the general lack of clarity of the
18 claims asserted in plaintiff's complaint, and also given counsel's apparent unwillingness or
19 inability to conform to the court's procedures for pretrial preparation, the court's intent in
20 requiring the Offer of Proof was simply to ascertain whether plaintiff had evidence to
21 support the claim that defendants had concealed material information regarding health and
22 smoking outside of advertising and promotion. The intent was not, as defendants seem to
23 be suggesting, to determine at this stage whether plaintiff can "prove" concealment.

24 Moreover, defendants' contention that plaintiff has abandoned all except one of the
25 four alternative elements listed under element (1) in CACI 1901 is not persuasive, nor is the
26 argument that because the court previously granted summary judgment as to the
27 affirmative misrepresentation claims, plaintiff is precluded from pursuing a concealment
28 claim based on some affirmative statement. This is not to say that the court finds that

1 plaintiff has established all the elements necessary to prevail on a claim of concealment.
2 Nevertheless, while the Offer of Proof is far from straightforward, it was not intended to
3 afford defendants another opportunity to seek summary adjudication of the concealment
4 claim. The concealment claim will be allowed to proceed to trial, but limited as follows.

5 Setting aside the questions whether plaintiff's evidence "establishes a duty" or
6 whether plaintiff has offered "proof" of reliance – issues that remain to be determined –
7 the court finds that evidence relating to post-1969 advertising and promotion must be
8 excluded, because claims of concealment based on statements in advertising and
9 promotion post-1969 are preempted by the Labeling Act. That is, any post-1969 evidence
10 that comes in must be unrelated to advertising and promotion. For example, assuming
11 such evidence is otherwise admissible, plaintiff has cited to a number of public statements
12 made by defendants in company documents (including press releases) and in deposition
13 testimony.

14 As for defendants' further objections to evidence, the court previously excluded
15 evidence of post-1987 tortious conduct (Docs. 289, 310) and sustained defendants'
16 objections to deposition designations relating to defendants' post-1987 knowledge,
17 statements, and public positions (Doc. 337), based on operation of statutory immunity
18 under California law for the ten-year period beginning January 1, 1988. Thus, such
19 evidence cannot be admitted to support an element of the concealment claim. Finally, to
20 the extent that any of plaintiff's exhibits relate to cigarette design, or to diseases other than
21 lung cancer, such evidence is excluded, in line with the court's prior rulings (Docs. 229,
22 337).

23 Unfortunately, however, the court's attempt to ascertain whether plaintiff has
24 evidence to support the claim that defendants concealed material information regarding
25 smoking and health outside of advertising and promotion has failed. This exercise has not
26 advanced the case and has largely been a waste of time. As set forth above in
27 excruciating detail, the court has already ruled in prior orders (Docs. 229 and 319) that
28 under Cipolline, a claim that defendants' post-1969 advertising and promotions should have

1 included additional warnings is preempted, while a claim that defendants concealed
2 material facts is not preempted insofar as it relies on a state-law duty to disclose such facts
3 through channels of communication other than advertising and promotion. The findings
4 made in this order change nothing.

5
6 **IT IS SO ORDERED.**

7 Dated: December 2, 2014



PHYLLIS J. HAMILTON
United States District Judge